

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 15-11-1995.

CRIMINAL APPEAL NO. 17 OF 1989

With

CRIMINAL APPEAL NO. 1003 OF 1988

For Approval and Signature:

THE HON'BLE MR. JUSTICE A.N. DIVECHA

And

THE HON'BLE MR. JUSTICE H.R. SHELAT.

1. Whether Reporters of Local Papers may be allowed to see the Judgment ?
2. To be referred to the Reporter or not ?
3. Whether Their Lordships wish to see the fair copy of Judgment ?
4. Whether this case involves substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
5. Whether it is to be circulated to the Civil Judge?

Criminal Appeal No. 17 of 1989:

Shri H.M. Chinoy, Advocate for the Appellant.

Shri S.R. Divetia, Additional Public Prosecutor for the respondent State.

Criminal Appeal No. 1003 of 1988:

Shri S.R. Divetia, Additional Public Prosecutor for the Appellant State.

Shri H.M. Chinoy, Advocate for the respondent.

Coram: A.N. Divecha, J. & H.R. Shelat, J.

(15-11-1995)

ORAL JUDGMENT: (Per: H.R. Shelat, J.)

These two appeals have been preferred against the judgment and order dated 29th October 1988, passed by the then learned Sessions Judge, Banaskantha at Palanpur, in Sessions Case No. 53 of 1988, whereby the appellant Narsinhbhai Gajabhai came to be convicted of the offence under Section 17 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act') and sentenced to rigorous imprisonment for 10 years and fine of Rs.1,00,000/- in default simple imprisonment for 2 years more.

2. In short, it is the case of the prosecution that the police officer at Tharad police station was informed that by the vehicles coming from Sachor towards Tharad certain persons were importing opium and liquor for the purpose of sale or passing on to the retailers. He therefore preferred to have a checking on the highway. On 15th November 1987 from 15.00 hours the police personnel were deployed on the road for the purpose of checking passing the vehicles. At 15.50 hours one person came near Budhanpur Patia post. He was having a suit case. Seeing the policemen he started to run and therefore the police suspected him. He was chased and caught hold of. He was interrogated and thereafter he was searched. From his suit case a polythene bag was found wherein opium about 50 grams was kept. It was also found that he was having no licence or permit to possess the same, and therefore the offence under Section 17 of NDPS Act was found to have been committed. He was arrested and complaint was lodged and at the conclusion of the investigation the police filed the charge-sheet before the Court of Judicial Magistrate, First Class at Tharad. As he was having no jurisdiction to hear and decide the case, he committed the case to the Court of Sessions at Palanpur for hearing and disposal in accordance with law. The then learned Sessions Judge framed the charge at Exh.3 to which the appellant Narsinhbhai Gajabhai pleaded not guilty. The prosecution then led necessary evidende. Appreciating the evidence on record the learned Judge below convicted Narsinhbhai Gajabhai of the offence under Section 17 of NDPS Act as stated hereinabove. Being aggrieved by the judgment and order of conviction and sentence, he preferred Criminal Appeal No. 17 of 1989. The State was not satisfied with the sentence awarded and was of the opinion that enhancement was necessary. The State has, therefore, preferred Criminal Appeal No. 1003 of 1988.

3. As both the appeals arise out of the same judgment and order and in both the appeals the issues to be decided being common, we dispose of both the appeals together by this common judgment.

4. Mr. Chinoy, learned Advocate representing appellant in Criminal Appeal No. 17 of 1989 submitted that though there were many points on which the judgment and order of the lower court could be assailed, but he would confine to one point going to the

root of the matter; and it was non-compliance of the mandatory provisions of Section 50 of the NDPS Act. As per that provision, it is incumbent upon the police officer making search to inform the accused even if accused may not pray for it or choose in this regard about his right of being searched in the presence of a Gazetted Officer or a Magistrate. If that is not done the conviction cannot be sustained because in that case the accused will be deprived of his valuable right. A similar question arose before the Supreme Court in the case of Saiyed Mohd. Saiyad Umar Saiyad & Ors. v. State of Gujarat - [(1995)(2)] 36 2) GLR 1315 and it is held that "Section 50 is a mandatory provision and therefore it is obligatory on the part of the police officer to inform the citizen that he has a right to have him searched in the presence of a Gazetted Officer or a Magistrate. Failure to inform is fatal." It is also held that "no presumption of the official act can be drawn in favour of the prosecution." In view of such law made clear by the Supreme Court, we perused the record and found nowhere that opportunity of being searched in the presence of a Gazetted Officer or a Magistrate was given. Mr. Divetia, the learned Additional Public Prosecutor representing the State also could not, after perusing the record, point out to us that the police officer making the search of the appellant-accused had informed about the right of being searched. When that mandatory provision is found to have been overlooked and not followed, the conviction and sentence cannot be maintained. In the result, Criminal Appeal No.17 of 1989 requires to be allowed and judgment and order convicting the appellant requires to be quashed. Consequently, Criminal Appeal No. 1003 of 1988 will have to be dismissed as question of enhancement would not survive for consideration. We accordingly dismiss Criminal Appeal No. 1003 of 1988 and allow Criminal Appeal No. 17 of 1989. The judgment and order convicting the accused under Section 17 of the NDPS Act are hereby quashed and accused Narsinhbhai Gajabhai is acquitted of the same. He be set at liberty if no longer required in any other matter and still in jail.

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